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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-735

SEARS ROEBUCK AND CO., *Petitioner,*

v.

SAN DIEGO COUNTY DISTRICT COUNCIL OF CARPENTERS, *Respondent.*

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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INTEREST OF THE AMICUS CURIAE *

The Chamber of Commerce of the United States of America [hereinafter the Chamber] is the largest association of business and professional organizations in the United States and, as such, is the principal spokesman for the American business community.

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* This brief is filed with the written consent of all parties pursuant to Supreme Court Rule 42.

The Chamber has a direct membership of over 86,000 corporations, partnerships, proprietorships, and professionals, as well as over 3,700 state and local chambers of commerce and professional and trade associations.

The Chamber regularly represents its members' interests in litigation matters before the courts, the United States Congress, the Executive Branch and Federal regulatory agencies. Such representation constitutes a significant aspect of the Chamber's activities and includes participation as an *amicus curiae* in numerous cases before this Court.[1]

The underlying issue presented in this case, whether, within the bounds of the U.S. Constitution, a state statute can preclude an employer from receiving common law relief for trespass on his private property by a union engaged in admittedly unprotected activity, is of major concern to the Chamber and its members.

The answer to this question will necessarily have a significant impact on the rights of many Chamber members and their manner of doing business. A company's interest in precluding unauthorized intrusion on its private property is based on more than mere naked title. Allowing access to distribution of union materials or solicitation by union organizers can weaken an employer's right to enforce an otherwise

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[1] *E.G., Scott Hudgens* v. *N.L.R.B.*, 427 U.S. 507 (1976); *New York Telephone Co.* v. *New York State Dept. of Labor*, —— U.S. ——, 59 L.Ed. 553 (1979); *Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local 100*, 421 U.S. 616 (1975); *N.L.R.B.* v. *Sears Roebuck & Co.*, 421 U.S. 132 (1975); *Industrial Union Department, AFL-CIO* v. *American Petroleum Institute, et al.*, No. 78-911 (pending).

legitimate no-solicitation policy against other forms of solicitation or distribution, as well as appearing to the general public that that particular activity is condoned. Moreover, permitting the distribution or solicitation activity presents the very real danger that individuals desirous of engaging in legitimate business activities will be discouraged from entering. Finally, the activity objected to herein creates potential safety and liability problems for employers. It is for this reason that the Chamber respectfully submits its views.

REASONS FOR GRANTING THE WRIT

I. The Moscone Act Impermissably Regulates Labor-Management Relations And Is Therefore Preempted By National Labor Policy

In its prior opinion in this case, this Court referred to three options open to any employer faced with picketing that is neither directly prohibited nor protected by the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*:

1) Permit the pickets to remain on its private property;

2) Forcefully evict the pickets; or

3) Seek the protection of the state's trespass law.

Sears Roebuck and Co. v. *San Diego County District Council of Carpenters*, 436 U.S. 180, 202 (1978).

In its decision on remand, the Supreme Court of California, relying on a statute passed during the pendency of this case, eliminated the last two options, leaving Sears with only the "option" of permitting the pickets to remain on its property. *Sears, Roebuck &*

Co. v. *Carpenters,* (A-1, 11, 14-15, n. 11). In this regard, the Court held that "peaceful picketing on privately owned sidewalks outside the employer's store is not subject to injunction," and that "judicial intervention in such a case is 'unnecessary' to protect substantial rights of the employer." Thus Sears is once again thrown into the trespassory picketing "no-man's land" referred to in Justice Blackmun's concurring opinion. *Sears, supra* at 208.

Congress, in enacting the N.L.R.A., clearly did not intend employers to be placed in the position where they had resort to neither the National Labor Relations Board nor to common-law prohibitions on trespass. Rather, resort to common-law trespass law is exactly the sort of "self-help" that Congress intended to be part and parcel of the collective bargaining process. *Cf. Lodge 76* v. *Wisconsin Employment Relations Comm'n.,* 427 U.S. 132, 139 (1976), *New York Telephone Co.* v. *New York State Department of Labor,* —— U.S. ——, 59 L.Ed. 2d 533 (1979). By abrogating Sears' right to resort to common-law prohibitions on trespass, California has impermissably interfered with the national labor scheme.

In *New York Telephone* v. *New York,* this Court reviewed its prior decisions on federal preemption of state statutes, and outlined when that doctrine would be applied. The Court distinguished *New York Telephone* from *Lodge 76* v. *Wisconsin Employment Relations Comm'n, supra,*[2] noting that the New York stat-

[2] In distinguishing *New York Telephone* and *Lodge 76,* this Court noted that the general purpose of the New York program was not to regulate the bargaining relationships between employers and employees, but rather "to provide an efficient means of insuring employment security in the state." [footnote omitted]

ute (which the Court found not preempted) "did not involve any attempt by the state to regulate or prohibit private conduct in the labor-management relations field." *New York Telephone,* 59 L.Ed 2d at 564. In this regard, this Court stated that its cases "have consistently recognized that a congressional intent to deprive the states of their power to enforce such general laws is more difficult to infer than an intent to preempt laws directed specifically at concerted activity." *New York Telephone, supra,* at 565. *See also Sears, supra,* 436 U.S. at 193. This Court in *Lodge 76* and *New York Telephone* also recognized that even though activity is neither protected nor prohibited by the N.L.R.A., a state statute can be preempted where it frustrates effective implementation of the Act's policies. *Sears, supra,* 436 U.S. at 199, *New York Telephone, supra,* at 563.

There can be no doubt that the Moscone Act upon which the California Supreme Court based its decision is a statute aimed expressly at concerted activity. In the first place, section b(2) of the statute legalizes, "Peaceful picketing or patrolling involving any labor dispute, whether engaged in singly or in numbers." As the Supreme Court of California stated: "The Moscone Act (Code Div. Proc., § 527.3) . . . establishes the le-

New York Telephone, supra at 564. In addition, the Court observed that the unemployment compensation program in *New York Telephone* received federal subsidies and therefore was structured to comply with a federal statute. "[A]s the Court has pointed out in the past, the federal statute authorizing the subsidy provides additional evidence of Congress' reluctance to limit the state's authority in this area." *New York Telephone* at 566. Since neither of these factors is present in the instant case, *Lodge 76* is controlling here and not *New York Telephone.*

gality of certain *labor practices* and limits the equity jurisdiction of the superior court to enjoin such practices. It is difficult to conceive of a statute which is directed more "specifically at concerted activity." *See supra* p. 5, *See* Cox, Labor Law Preemption Revisited, 85 *Harv.L.Rev.* 1337, 1355-56.

That Congress was aware at the time of enactment of the National Labor Relations Act that employers would have access to state courts to enforce common-law prohibitions on trespass appears obvious. In this regard, Professor Cox has stated in his well-accepted article on labor preemption:

> "It is equally plain that Congress developed this special framework for self-organization and collective bargaining within a larger context of state law creating *rights of property,* bodily security and personality, preserving public order, and promoting public health and welfare (emphasis added). Cox, *supra,* at 1355.

Inasmuch as Congress was aware of this state remedy at the time of passage of the statute and has made no attempt subsequently to preclude its use leads to a strong inference that Congress intended that employers have access to it. Cf., *New York Telephone, supra* at 572.

Finally, it appears indeed incongruous that the union here is in a better position than if it invoked the Board's jurisdiction. For if it did so, it would have to rationalize its conduct pursuant to the criteria of *N.L.R.B.* v. *Babcock and Wilcox,* 351 U.S. 105 (1956). And, as this Court previously noted in this case, the right of an employer to *bar* non-employee union organizers from his property "remains the general rule." *Sears* v. *Carpenters, supra* at 205.

Whether California could intrude in this manner on labor-management relations deserves resolution by this Court.

II. California's Taking of Private Property for Union Activities Violates the Fifth and Fourteenth Amendments.

The Moscone Act as interpreted by the California Supreme Court appropriated Sears' private property for union picketing by non-employees. In *Lloyd Corp.* v. *Tanner,* 407 U.S. 551 (1972); *Central Hardware Co.* v. *N.L.R.B.,* 407 U.S.. 539 (1972); and *Scott Hudgens* v. *N.L.R.B.,* 424 U.S. 507, 520-521 (1976), this Court held that the First Amendment does not protect either nonlabor or labor picketing on private property and, in particular, on shopping center property. In *Central Hardware* and again in *Hudgens,* this Court reaffirmed its holding in *Babcock and Wilcox, supra,* at 112, that conflicts between labor's statutory right to picket and employers' constitutional property rights must both be accommodated in such a manner that there is as "little destruction of one as is consistent with the maintenance of the other." *Hudgens, supra,* at 521.

Despite the clear and repeated mandate of this Court, the California Supreme Court believed it was immune from this principle because "the *Babcock and Wilcox* doctrine . . . rest[s] upon a statutory and administrative basis not found in California law." (A-13).

In so holding, the California Court ignores the fact that the employer's right under *Babcock* and *Wilcox* are founded in the Fifth and Fourteenth Amendments'

protection of private property rights. Or as dissenting Judge Richardson stated:

> " . . . the federal principle discussed in *Babcock, Central Hardware* and *Hudgens* clearly is solidly founded upon the *private property rights* of the store owner, which rights derive not from any capricious or evanescent state statute, but rather upon the rock-solid footing of the Fifth and Fourteenth Amendments of the United States Constitution." (emphasis in original) (A-23).

The Chamber strongly believes that the California Supreme Court's blyth abrogation of the constitutional property rights justifies the granting of the writ requested in this case. For, if states can so easily erase an employer's ability to protect his constitutional rights, those rights have effectively ceased to exist.

CONCLUSION

For all the foregoing reasons, the petition for writ of certiorari filed by Sears, Roebuck & Company should be granted.

Respectfully submitted,

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